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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1003

C. GEORGE SWALLOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS TENTH CIRCUIT.

The petitioner, C. George Swallow, petitions this Court to grant a Writ of Certiorari directed to the United States Court of Appeals, Tenth Circuit, in the above entitled case. Petitioner alleges:

OPINION OF THE COURT BELOW.

The opinion of the court below has never been published officially. Unofficially, it has been printed in 64 CCH—1, U. S. T. C. 9117.

JURISDICTION OF THIS COURT.

(i) *Date of Judgment:*

The date of judgment sought to be reviewed and the date of its entry is December 12, 1963.

(ii) *Rehearing:*

No order was entered in respect of a Rehearing.

EXTENSION OF TIME

On March 11, 1964 an order was entered by this Court extending the time to April 10, 1964, within which a Petition for Certiorari might be filed in this case.

(iii) *Statutory Provisions in Respect of Jurisdiction of this Court:*

The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by a Writ of Certiorari are:

U. S. C. Title 28, Section 1254 (1).
U. S. C. Title 28, Section 2201 (e).

THE QUESTIONS PRESENTED FOR REVIEW CONSIDERING THE INCOME TAX PROVISIONS OF THE INTERNAL REVENUE CODE AS A WHOLE

1. May an accused person be convicted of a crime based upon the income tax provisions of the Internal Revenue Code in the light of a contention that these laws, together with Sections 7201 and 7203 of the Internal Revenue Code are unconstitutional and void?

2. Are the Income Tax provisions of the Internal Revenue Code, taken as a whole, so complex, so complicated, confusing and intricate that no one is equipped with powers to make out and file an income tax return?

3. May the Government require a man to do that which he cannot honestly do?

4. May the Congress enact a law or group of laws, in respect of the assessment, levy and collection of income taxes that purports to tax incomes and also purports to

give arbitrary preferences to special taxpayers or groups of taxpayers?

5. May the Congress of the United States collect taxes on income which it systematically and consciously uses for the benefit of peoples and Governments other than the peoples of the United States and other than the Government of the United States?

6. May the Congress of the United States enact special preferences in laying, levying and collecting incomes taxes with religionists, religions and religious organizations?

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment (App. B, p. 22); Fifth Amendment (App. B, p. 22); and Sixteenth Amendment (App. B, p. 23).

STATUTORY PROVISIONS INVOLVED.

Internal Revenue Code U. S. C. 26; Section 1 (App. B, p. 23); Section 11 (App. B, p. 25); Section 103 (App. B, p. 26); Section 613 (App. B, p. 32); Section 167 (App. B, p. 28); Section 212 (App. B, p. 31); Section 7201 (App. B, p. 34); Section 7203 (App. B, p. 35); and Section 145, Internal Revenue Code of 1939 (App. B, p. 27).

CONCISE STATEMENT OF THE CASE.

Petitioner was convicted on two counts of a violation of U. S. C. Title 26, U. S. 1939 Section 145(b) and Section 7201 of the Internal Revenue Code 1954. (Transcript of Record in the Court of Appeals, page 5.) The Court of Appeals affirmed his conviction, and this Court denied a certiorari.

He was taken into the custody of the United States

Attorney General and while he was in custody, he filed a Motion under U. S. C. Title 28 Section 2255 alleging that the laws under which he was convicted, taken as a whole, were unconstitutional in that they violated the Fifth Amendment, in that no one knew how to calculate an income tax return, in that the income tax provisions of the Code were arbitrary, discriminatory and in that they contained provisions discriminating in favor of religionists, religions and religious organizations, in violation of the First Amendment.

The District Court of Colorado denied petitioner's motion. On appeal the United States Court of Appeals affirmed. This petition follows.

JURISDICTION OF THE DISTRICT COURT

The District Court of Colorado had jurisdiction of this case, under authority of U. S. C. Title 28, Section 2255, in the first instance.

CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This is a rather unusual case in that the Government filed no pleadings in the District Court and made no argument there. When this case came to the Court of Appeals, Tenth Circuit, the only argument made by the government was that *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, was controlling on the question of discrimination. In its opinion the lower court made the first argument worthy of name against the four contentions made by the petitioner. These are:

1. Nobody knows how to make out and file an income tax return. To compel anyone to do so and to punish him for not doing so is violative of the Fifth Amendment.

2. That the discriminations made in the law are of such magnitude that they violate the Fifth Amendment.

3. That the Government is systematically and consciously obtaining money through the income tax laws to give to foreign peoples and foreign governments in violation of the Fifth Amendment.

4. Certain provisions of the income tax laws exempt or give tax advantages to religionists, religions and religious organizations in violation of the First Amendment.

I.

It is here contended that no one knows how to make out an income tax return or to calculate the amount of money he should pay to the Government in each year. If this Court, with all its experience in tax matters, does not know, as a fact, that no one knows how to make out an income tax return, there is little can be said on the subject to demonstrate it. In an abundance of caution we point out that the Treasury Department does not know the income tax laws for which it is primarily responsible. *Acker* v. *Commissioner*, 361 U. S. 87.

Many cases come to this court for review, most of which are based upon a difference of opinion between Circuit Courts of Appeal on the subject. Since these must ultimately be decided by this Court they are decided here, almost uniformly, with dissenting opinions in this Court. This situation stems from the fact that the income tax laws are couched in language that is vexatiously difficult to understand, even for conscientious, careful and learned Judges and Justices who must decide the questions presented to them. It is apparent on its face that the courts cannot easily decide these questions. To say that the average taxpayer, much less the intellectually subnormal taxpayer, can understand these provisions is to deny the obvious, and

yet by the provisions of Section 145(b) of the 1939 Internal Revenue Code and the provisions of Sections 7201 and 7203 of the 1954 Internal Revenue Code, a taxpayer is compelled to calculate and file his income tax return yearly or be punished for his failure to do so. If, as petitioner believes clear, that he cannot do the act which the law requires him to do, the Fifth Amendment certainly protects him from being punished. This needs no citation of authority. The court below believed citations to be necessary on this subject. It seems to petitioner that so clear a violation of the Fifth Amendment would be rank tyranny, which the Fifth Amendment on its face was adopted to prevent.

II.

Petitioner turns now to his second contention: that is that the income tax provisions of the Intenal Revenue Code taken as a whole are so discriminatory as to violate the Fifth Amendment. It was not until *Bolling v. Sharpe*, 347 U. S. 497 we came a long way to escape from the contention that since the Fifth Amendment did not contain an "equal protection of the law" clause, as does the Fourteenth Amendment, the Fifth Amendment was to be construed as not containing the concept of equal protection of the law. In the light of history and early cases, this position is not tenable. The oath of office taken by the members of this Court is based upon the concept that the rich and the poor should be treated equally. Thomas Jefferson, in the Declaration of Independence and Abraham Lincoln in his Gettysburg Address expressed the thesis that men should be treated equally. The lore of this nation is full of examples that this country is a nation which is dedicated to the equality of man.

In the Attorney General's argument in *Pollack v. Farmers' Loan and Savings Bank*, 157 U. S. 429, 507, he admitted

that a law that discriminates between blondes and brunettes would be an abuse of the taxing power. Mr. Justice Field, in the same case, stated that any exaction which did not levy an equal and proportionate amount on all persons is not a tax. *Pollack* v. *Farmers' Loan and Savings Bank*, 157 U. S. 429, 599.

The Government has in the past argued that proper classifications of taxpayers is permissible and petitioner believes that this is correct, as is demonstrated in the cases arising under state laws which have been decided by this court under the Fourteenth Amendment. It has been said that in the income tax every provision except the first is an exception, and while this is not accurate, it is substantially true. Petitioner does not intend to make this a catalogue of the crimes inherent in the income tax laws, but believes that it will be helpful to this Court to show the character of the arbitrary classifications that damn this law in the light of reason. All sections referred to herein are from 26 U. S. C.

Starting with Section 1, App. 23, Exhibit D, compared with Section 11, App. 25, Exhibit E, the rates charged individuals compared with the rates charged corporations, we find that a corporation pays less tax than individuals, and in the higher brackets for individuals, substantially less. In *Pollack* v. *Farmers' Loan and Savings Bank*, 157 U. S. 429, it was contended that the provision which required corporations to pay more taxes than individuals on the same amount of income was justified on the ground that it was a proper classification and not arbitrary because the corporation has great economical advantages that the individual could not have. It is to be supposed that now we will have a new argument which will demonstrate for some reason that corporations should have advantages over individuals. Petitioner, believing that both these positions are incorrect, and the

first requires re-examination in the light of Mr. Justice Field's opinion in the *Pollock* case, namely that all taxpayers should pay an equal and proportionate tax.

The next proposition, because it is perhaps the most flagrant, is the tax advantage given to those who extract oil and other mineral resources from the ground, commonly called the "depletion clause." The depletion provision is embodied in Section 613 of the Internal Revenue Code. App. 32, Ex. J. There, in order to be "just and fair," the Congress has provided that a percentage advantage be given to those who own royalties on oil, by relieving them of paying any taxes on the first 27½% of the income derived from the business of watching the oil being pumped from the ground, and different percentages for other income on minerals. Everybody agrees that this is about as arbitrary a discrimination as may be found. Of course the amount of money that A has to pay because of the tax advantage given to B, who happens to own oil royalties, is vast. Nobody has been found who is not the recipient of this tax advantage who does not regard it as being an arbitrary discrimination against everyone who does not profit by it.

The next tax advantage which petitioner considers a horrible example of the income tax provision of the Internal Revenue Code is that called "depreciation." Everyone knows that under the provisions of Section 167 of the Internal Revenue Code, App. 28, Ex. H, depreciation is a deduction from gross income, and this is the way it is done: we have a "straight line" method of ascertaining what it is, we also have the "declining balance method, and the sum of the years-digits method" as well as another, but we all know that as a result of this provision that many of the great edifices in our modern cities are being sold from time to time so that the new owners can re-depreciate a building which in actuality has appreciated rather than depreci-

ated. A few years ago it was very common that a building which had been fully depreciated under the income tax provisions of the law was sold so that the new owners could get a tax advantage which the old owners had exhausted for themselves.

Now we come to long term capital gains, Section of the Internal Revenue Code. Petitioner does not pause to argue about this. Professor Stanley S. Surrey, one time professor of law at Harvard University, and now one of the advisors to the President of the United States, once pointed out that this provision had no justification either in law or in economics. In the main, it is a Congressional concept to afford a tax advantage for people who are in the stock market. One of these provisions was enacted for the purpose of giving Louis Mayer and one of his associates a tax advantage. It was so drafted as to preclude any other person in the United States from obtaining the advantage. It saved Mr. Mayer from the "hardship" of paying a sum considerably over a million dollars. Petitioner is not a statistician. Professor Surrey wrote on this subject also. His comments on it will be found in 70 Harvard Law Review, 745.

The next arbitrary distinction is contained in Section 103 of the Internal Revenue Code, App. 26, Ex. F, which exempts all income received on securities issued by a State, as well as other securities. This discrimination is founded on history, a history which is no longer pertinent since the States have surrendered, by the adoption of the Sixteenth Amendment their right to freedom from Federal taxation, which prior to its adoption existed. In any event, the exemption of income derived from Federal taxation is now an arbitrary discrimination. Also see App. 21, Ex. I. Under this provision business men have been led to eat caviar for lunch and wieners at home for dinner. "Its deductibility" has scandalized the nation.

There are hundreds, if not thousands, of tax advantages set forth in the Internal Revenue Code, which could be mentioned but will not be, lest this petition be turned into a catalogue of the crimes committed by the Government to shift the burden of supporting the Government of the United States from the shoulders of those who cannot afford to pressure Congress and put that burden on the farmers, butchers, bakers and candlestick makers. It is a fraud perpetrated by the Congress of the United States on its people, damned by the Fifth Amendment and God.

Petitioner believes that if the people of the United States knew that this shifting of the burden of paying the cost of Government was being imposed upon them in the fashion that it actually is, to the advantage of a few, they would take methods of protesting other than having six States pass resolutions to abolish the Sixteenth Amendment. They might even, as the people of other nations have done, revolt.

III.

Petitioner's next contention is that, as Hamilton observed in the Federalist 10, Governments would always use the resources that it had at hand for one purpose or another. The income tax provision of the Internal Revenue Code has been so productive of money that we have been sorely put to inventing new ways of using money, and so we have come to the place where over one hundred billion dollars have been given to "foreign aid." In *U. S. v. Butler*, 297 U. S. 1, our Supreme Court recognizes the principle that one group of states or one group of United States taxpayers could not be taxed for the purpose of satisfying the economic well-being of another group of American taxpayers. Giving the broadest interpretation to the general welfare clause, it was held in *Butler* that processors of grain could not be taxed to collect a fund from which

farmers could be paid for not growing crops; to do so would be violative of the Fifth Amendment. It is difficult to believe that if the principle of the *Butler* case be the law, that Congress can constitutionally appropriate money for the advantage of other governments and other people without violation of the Fifth Amendment. We see no reason to believe that the Congress of the United States can consciously and continuously do what it is doing with tax money derived from the income tax provisions of the Internal Revenue Code, in the light of the *Butler* case. The lower court seemed to believe that because the Executive Department of the Government has complete control of foreign affairs, it was authorized to pick the pockets of the American people under the income tax provisions to aid others whereas here it is known in advance that part of this money is to be used for the general welfare of foreign governments and foreign peoples. Petitioner believes that the United States was conceived on the thesis that the economic welfare of the people of the United States was of more importance to the people who formulated this government than the economic welfare of other peoples and other governments.

IV.

We next come to the proposition that the Internal Revenue Code, in Sections 107, 170(c)(2)(b), *infra*, provides for tax advantages for religionists, religions and religious organizations, in violation of the First Amendment. The First Amendment of the Constitution of the United States provides in part:

> Congress shall make no law respecting an establishment of a religion . . .

The Income Tax laws in critical parts provide as follows:

(a) Section 107

"In case of a minister of the gospel, gross income does not include—

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation to the extent used by him to rent or provide a home.

(b) Deductions allowable to individuals and corporations include:

Section 170(c)(2)(B) provides:

"For purposes of this section the term charitable contribution means a contribution or gift to or for the use of . . . a corporation, trust or community chest, fund or foundation . . . organized and operated for religious . . . purposes . . ."

These religious contributions represent deductions from the gross income or are exempt from any taxation.

(The Treasury Department issued in 1960 a "Cumulative List" of organizations described in Section 170(c). This contains the names of eligible corporations and other legal entities approved by the Treasury to the extent of 363 pages of close printings. They are mostly religious in character).

(c) Section 501 *et seq.* provides for exemption from any taxation income of certain organizations. Among these are:

(c)(3) "Corporations, and any community chest, fund or foundation organized and operated exclusively for religious . . . purposes."

(d) Religious or apostolic associations or corporations . . .

These provisions are now critically examined to determine whether they square with the First Amendment.

(When it is said in this brief that the Government pays a part of the bill by allowing exclusions, exemptions, deductions and the like, it means that the Government, by use of these techniques, is paying a part of the bill by allowing the taxpayer freedom from taxation of the amount of taxes he would be required to pay, absent the tax advantage given to him. It is not meant that the Government actually issues its check, but rather that it credits the taxpayer's bill for taxes which would otherwise be due. In the end it amounts to the same thing from a dollars and cents point of view: the Government and other taxpayers lose and the religionist, religious and religious organizations gain.)

It is not necessary to go beyond the rationale of the decisions in the last case decided under the establishment of a religion clause of the First Amendment to demonstrate that the First Amendment is flouted in the provisions of the Income Tax laws which are quoted above.

In *Engel et al.* v. *Vitale et al.*, 370 U. S. 421, the Supreme Court said enough to demonstrate beyond peradventure that these provisions of the Income Tax laws run afoul the Constitutional provisions quoted above. In that case the State Board of Regents of New York formulated a prayer to be given at the opening of tax-maintained schools every morning. Among the plaintiffs in the case was one agnostic. The plaintiffs objected to the giving of the prayer in a publicly supported school because the prayer, they contended, was in violation of the First Amendment. The Supreme Court held that they were correct and denounced the law authorizing the giving of the prayer, notwithstanding the prayer was, it was asserted, non-denominational. Indeed, it was as non-denominational as it could be made.

It is recognized that this case is not directly "in point," but there can be no doubt that under the rationale of the

Vitale case and other cases quoted below, the "grace" extended to those who make contributions to religious and apostolic organizations is in actuality a contribution by the Government to the maintenance of a religion. The provisions of the Income Tax laws quoted above are nothing short of battering rams used to break down the barrier between church and state.

McCollum v. Board of Education, 333 U. S. 203;
Everson v. Board of Education, 330 U. S. 1;
McGowan v. Maryland, 366 U. S. 420 (dissent, at page 563).

Here it is too plain for debate that the man who has a taxable income of over $500 per year and who wants to contribute to a church may contribute fifty dollars to it, knowing he will obtain a tax benefit of ten dollars, so in essence he is contributing only forty dollars. Thus, the Government contributes ten dollars to his church. More significantly, if a man with a taxable income of over two hundred thousand dollars per year contributes ten thousand dollars to his church, all that ultimately comes out of his pocket is nine hundred dollars and the Government pays the remaining $9,100, not by check but by "grace."

It ought to be obvious that if, as is the fact, the Federal Government is expressly prohibited from making a grant toward the expenses of building a church, it ought not be able to effectuate the same end through the medium and subterfuge of a tax law.

Since the prohibition of the "establishment of a religion" concept was so dear to the hearts of those who founded this nation, and since the economic effect of the provisions of the Income Tax laws shown above is so great, it does not seem conceivable that this concept could be circumvented by an Income Tax law. In passing on constitutional questions our Supreme Court has always looked to the substance and not to form.

But there is a greater vice in these provisions.

Left to the determination of the Secretary of the Treasury is the question of: What is a religion? Would he have included the "I AM" religion? The Supreme Court did. *Ballard v. United States*, 332 U. S. 78.

Enough was said in the *Vitale* case referred to above to demonstrate the dangers of leaving to civil authority this type of determination.

Of course, it goes without any need for delineation that the exclusion of the value of occupying a home as a parsonage is in derogation of the "establishment of a religion" clause. The value of the rent of the home which would be income to anyone other than a religious leader—is not income to the religious leader.

These unconstitutional provisions in the Income Tax laws are sufficient to denounce the entire Income Tax laws because they are an inseparable part of the law, taken as a whole, and one of such quantitative significance as to denounce all of the remaining sections of the Income Tax laws.

The provisions of the Sixteenth Amendment are set forth in Exhibit "C" in the Appendix "B."

Mr. Walter Heller, an advisor to the President of the United States, has pointed out that the Sixteenth Amendment is being used as an instrument for doing "chores"—chores which involve "socially desirable" legislation which could not be enacted on its own account by giving tax advantages to aid these socially desirable projects. See "Panel Discussions Before the Committee on Ways and Means of the House of Representatives, 86th Congress, First Session" printed for the use of the Committee on Ways and Means, Government Printing Office, 1960, Page

59, *et seq.* It is contended that the Sixteenth Amendment was adopted to raise money to support the Government and that when the money is used for any other purpose it is an abuse of the power granted, particularly for any purpose, which if not buried in an income tax law could not be enacted.

CONCLUSION

In conclusion petitioner shows this Court that Professor Joseph A. Pichman has demonstrated that only one hundred forty-nine billion six hundred million dollars of a total of three hundred fifty billion six hundred million dollars income of individuals in 1957 appeared in the aggregate of total gross income of taxpayers. Panel Discussions, *supra* 111 *et seq.* Mr. William A. Hellmuth, Jr., presented figures demonstrating that corporate taxpayers in 1954 paid taxes only on forty-four billion dollars out of a total of fifty-five billion dollars income. Panel Discussion, 116. It becomes apparent then, based upon the figures of these two professors, that not over two-thirds of the national income is taxed due to preferences and tax advantages given to favored taxpayers. If this be conceded to be true, those taxpayers which are required to pay taxes on their incomes without preference, pay one-half more than they would be required to pay if no preference were given to anyone. In the light of this, it seems apparent that the court below was not correct when it asserted, as it did, that the petitioner here did not show that he was affected by any of the points he raised in his brief or by any of the points he raised on the question of the constitutionality of the Income Tax provisions of the Internal Revenue Code taken as a whole.

We think it clear, as Mr. Justice Field in *Pollock v. Farmers' Loan and Savings Bank*, said that any advantage given to any taxpayer, whether it be one or a

billion dollars, shifted the burden of paying the cost of government from one man to another, and that if advantage be given to A, the rest of the people of the United States had to foot the bill to balance for such advantage. This is a mathematical certainty. There is no one who knows anything about the Income Tax provisions of the Internal Revenue Code who does not know that it is a horrendous thing, a "hodge-podge" as it is sometimes called, a conglomeration of arbitrary provisions.

It ought to be denounced by this Court to relieve the tensions of the American people that come with the Ides of March lest they be sent to jail for violation of law on the Ides of April. Every expert in the nation has denounced these provisions. The late and lamented President of the United States, John F. Kennedy, in the "President's Messages Along With Principal Statement, Detailed Explanation and Supporting Documents submitted by the Secretary of the Treasury, Douglas Dillon, in connection with the President's recommendation Contained in his Message on Taxation, at Hearings Conducted by the Committee on Ways and Means of the House of Representatives (printed by the United States Government Printing Office, dated May 3, 1961)" denounced many of its provisions. Professor Surrey has denounced many of its provisions. Professor Walter Heller has denounced many of its provisions, and finally, the Collector of Internal Revenue, when he was a law professor, denounced its provisions as having a demoralizing effect on the people of the United States in that many of them, knowing that they were being defrauded, took advantage of many of the provisions to lessen their load and created new advantages for themselves not explicit in the Code.

This is a case of prime importance to millions of our people not in any sense considered since *Brushaber*. Much water has gone over the dam since 1894. It is significant

that when the proponents of the infallibility of every tax law quote *Brushaber* they leave out of account that this Court in *Brushaber* took into account that tax laws could be so discriminatory as to be proscribed by the Fifth Amendment.

Respectfully submitted,

JOSEPH KEIG, SR.,
Attorney for Petitioner.

APPENDIX A

OPINION BELOW

There is appended at the end of this petition the opinion of the Court below.

OPINION OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

[¶ 9117] C. George Swallow, *Appellant* v. United States of America, *Appellee*.

Before Pickett, Lewis and Breitenstein, *Circuit Judges*.

Per Curiam: Appellant, Swallow, was convicted of income tax law violations, and his conviction was affirmed on appeal. *Swallow* v. *United States* [62-2 USTC ¶ 9693], 10 Cir. 307 F. 2d 81, cert. denied 371 U. S. 950, reh. denied 372 U. S. 925. By motion under 28 U. S. C. § 2255, he alleges that the statutes under which he was convicted are unconstitutional and the sentence therefore void. It is asserted in the motion that the income tax laws and regulations are so complex that it is impossible for a taxpayer to comprehend and comply with them, and, therefore, violate the Fifth Amendment to the Constitution of the United States; that such laws, when considered as a whole, are unconstitutionally arbitrary, unfair and discriminatory; that the tax proceeds are used for unconstitutional purposes such as the economic welfare of certain groups of tax payers, foreign people and foreign governments; and, finally, it is alleged that certain provisions of the Internal Revenue Code violate the establish-

ment of religion clause of the First Amendment to the Constitution. Swallow appeals from an order denying the motion.

The income tax provisions of the Internal Revenue Code and the regulations promulgated thereunder are complex and often difficult of understanding, but we have found no authority which suggests that statutes are unconstitutional for this reason or that the rates constitute a taking of property within the meaning of the Fifth Amendment. It is now well settled that the income tax laws are not unconstitutional under the due process clause of the Fifth Amendment, nor are they unconstitutionally defective because of discriminatory progressive tax rates. *Brushaber* v. *Union Pacific R. Co.*, [1 USTC ¶ 4], 240 U. S. 1; *Knowlton* v. *Moore*, 178 U. S. 41; *Acker* v. *Commissioner*, 6 Cir., [58-2 USTC ¶ 9804] 258 F. 2d 568, aff'd [59-2 USTC ¶ 9757] 361 U. S. 87.

There is no merit to the contentions that the income tax laws are unconstitutional because the tax proceeds are used to promote the economic welfare of another group of taxpayers or foreign governments and their people. A federal court will not review the foreign policy of the government or the wisdom of the congressional appropriations for welfare purposes. This is an area exclusively within the jurisdiction of the legislative and executive branches, even when the allegation is made that income tax monies are being used to carry on an aggressive war. *Farmer* v. *Rountree*, D. C. Tenn., [56-2 USTC ¶ 10,005] 149 F. Supp. 327, aff'd [58-1 USTC ¶ 9275] 252 F. 2d 490, cert. denied 357 U. S. 906, reh. denied 358 U. S. 858. *Cf. Frothingham* v. *Mellon*, 262 U. S. 447. In *Whetstone* v. *United States*, N. D. Ill. [48-2 USTC ¶ 9412], 82 F. Supp. 478, 479, cert. denied 337 U. S. 941, reh. denied 338 U. S. 840, the court said:

"Congress alone has the power to appropriate money

to promote the general welfare and its determination that certain projects are in furtherance of general welfare is decisive. Courts are not concerned with the wisdom of legislative policies, their only function being to interpret the statutes so as to promote and effectuate the disclosed intent of Congress."

Nor is there any substance to appellant's contention that exemptions and deductions allowable for charitable and religious purposes contravene the establishment of religion clause of the First Amendment. *Abraham J. Muste* v. *Commissioner* [CCH Dec. 24,708], 35 T. C. 913. Constitutional questions will not be decided upon hypothetical sets of facts. *Crane-Johnson Co.* v. *C. I. R.*, 8 Cir., [39-2 USTC ¶ 9652] 105 F.2d 740, aff'd [40-2 USTC ¶ 9756] 311 U. S. 54. Moreover, appellant has not shown how his rights could be affected if these activities were held to be unlawful.

AFFIRMED.

APPENDIX B.

Text of Amendments to the Constitution Involved.

EXHIBIT A.

AMENDMENT [I].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

EXHIBIT B.

AMENDMENT [V].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EXHIBIT C

AMENDMENT [XVI]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

EXHIBIT D

Statutory Provisions Involved

(Discussed Here.)

USC TITLE 26, SECTION 1.

§ 1. *Tax imposed.*

(a) *Rates of tax on individuals.*—A tax hereby imposed for each taxable year on the taxable income of every individual other than a head of a household to whom subsection (b) applies. The amount of the tax shall be determined in accordance with the following table:

If the taxable income is	The tax is
Not over $2,000	20% of the taxable income
Over $2,000 but not over $4,000	$400, plus 22% of excess over $2,000
Over $4,000 but not over $6,000	$840, plus 26% of excess over $4,000
Over $6,000 but not over $8,000	$1,360, plus 30% of excess over $6,000
Over $8,000 but not over $10,000	$1,960, plus 34% of excess over $8,000
Over $10,000 but not over $12,000	$2,640, plus 38% of excess over $10,000

If the taxable income is	The tax is:
Over $12,000 but not over $14,000	$3,400, plus 43% of excess over $12,000.
Over $14,000 but not over $16,000	$4,260, plus 47% of excess over $14,000.
Over $16,000 but not over $18,000	$5,200, plus 50% of excess over $16,000.
Over $18,000 but not over $20,000	$6,200, plus 53% of excess over $18,000.
Over $20,000 but not over $22,000	$7,260, plus 56% of excess over $20,000.
Over $22,000 but not over $26,000	$8,380, plus 59% of excess over $22,000.
Over $26,000 but not over $32,000	$10,740, plus 62% of excess over $26,000.
Over $32,000 but not over $38,000	$14,460, plus 65% of excess over $32,000.
Over $38,000 but not over $44,000	$18,360, plus 69% of excess over $38,000.
Over $44,000 but not over $50,000	$22,500, plus 72% of excess over $44,000.
Over $50,000 but not over $60,000	$26,820, plus 75% of excess over $50,000.
Over $60,000 but not over $70,000	$34,320, plus 78% of excess over $60,000.
Over $70,000 but not over $80,000	$42,120, plus 81% of excess over $70,000.
Over $80,000 but not over $90,000	$50,220, plus 84% of excess over $80,000.
Over $90,000 but not over $100,000	$58,620, plus 87% of excess over $90,000.
Over $100,000 but not over $150,000	$67,320, plus 89% of excess over $100,000.
Over $150,000 but not over $200,000	$111,820, plus 90% of excess over $150,000.
Over $200,000	$156,820, plus 91% of excess over $200,000.

EXHIBIT E.

USC Title 26 Section 11.

§ 11. *Tax imposed.*

(a) *Corporations in general.*—A tax is hereby imposed for each taxable year on the taxable income of every corporation. The tax shall consist of a normal tax computed under subsection (b) and a surtax computed under subsection (c).

(b) *Normal tax.*—

(1) *Taxable years beginning before April 1, 1956.*—In the case of a taxable year beginning before April 1, 1956, the normal tax is equal to 30 percent of the taxable income.

(2) *Taxable years beginning after March 31, 1956.*—In the case of a taxable year beginning after March 31, 1956, the normal tax is equal to 25 percent of the taxable income.

(c) *Surtax.*—The surtax is equal to 22 percent of the amount by which the taxable income (computed without regard to the deduction, if any, provided in section 242 for partially tax-exempt interest) exceeds $25,000.

(d) *Exceptions.*—Subsection (a) shall not apply to a corporation subject to a tax imposed by—

(1) section 594 (relating to mutual savings banks conducting life insurance business),

(2) subchapter L (sec. 801 and following, relating to insurance companies),

(3) subchapter M (sec. 851 and following, relating to regulated investment companies), or

(4) section 881 (a) (relating to foreign corporations not engaged in business in United States). Aug. 16, 1954, 6:45 a.m., E. D. T., c. 736, 68A Stat. 11; Mar. 30, 1955, c. 18, § 2, 69 Stat.

EXHIBIT 7.

USC Title 26 Section 103.

§ 103. *Interest on certain governmental obligations.*

(a) *General rule.*—Gross income does not include interest on—

(1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing or of the District of Columbia;

(2) the obligations of the United States; or

(3) the obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States and if the respective Acts authorizing the issue of the obligations the interest is wholly exempt from the taxes imposed by this subtitle.

(b) *Exception.*—Subsection (a) (2) shall not apply to interest on obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit, to the extent they represent deposits made before March 1, 1941), unless under the respective Acts authorizing the issuance thereof such interest is wholly exempt from the taxes imposed by this subtitle.

EXHIBIT G

USC Title 26 (1939 Code, 1946 ed.) Section 145(b)

"SEC. 145. *Penalties.*—(a) *Failure to file returns, submit information, or pay tax.*—

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

EXHIBIT H.

USC Title 26 Section 167.

§ 167. *Depreciation*

(a) *General rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(b) *Use of certain methods and rates.*—For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method

(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1).

(3) the sum of the years-digits method, and

(4) any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the taxpayer's use of the property and including the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

(c) *Limitations on use of certain methods and rates.*—Paragraphs (2), (3), and (4) of subsection (b) shall apply only in the case of property (other than intangible property) described in subsection (a) with a useful life of 3 years or more—

(1) the construction, reconstruction, or erection of which is completed after December 31, 1953, and then only to that portion of the basis which is properly attributable to such construction, reconstruction, or erection after December 31, 1953, or

(2) acquired after December 31, 1953, if the original use of such property commences with the taxpayer and commences after such date.

(d) *Agreement as to useful life on which depreciation rate is based.*—Where, under regulations prescribed by the Secretary or his delegate, the taxpayer and the Secretary or his delegate have, after the date of enactment of this title, entered into an agreement in writing specifically dealing with the useful life and rate of depreciation of any property, the rate so agreed upon shall be binding on both the taxpayer and the Secretary in the absence of facts or circumstances not taken into consideration in the adoption of such agreement. The responsibility of establishing the existence of such facts and circumstances shall rest with the party initiating the modification. Any change in the agreed rate and useful life specified in the agreement shall not be effective for taxable years before the taxable year in which notice in writing by registered mail is served by the party to the agreement initiating such change.

(e) *Change in method.*—In the absence of an agreement under subsection (d) containing a provision to the contrary, a taxpayer may at any time elect in accordance with regulations prescribed by the Secretary or his delegate to change from the method of depreciation described

in subsection (b) (2) to the method described in subsection (b) (1).

(f) *Basis for depreciation.*—The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain on the sale or other disposition of such property.

(g) *Life tenants and beneficiaries of trusts and estates.*—In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust, the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each. In the case of an estate, the allowable deduction shall be apportioned between the estate and the heirs, legatees, and devisees on the basis of the income of the estate allocable to each.

(h) *Depreciation of improvements in the case of mines, etc.*—

For additional rule applicable to depreciation of improvements in the case of mines, oil and gas wells, other natural deposits, and timber, see section 611.

EXHIBIT I.

USC Title 26 Section 212.

§ 212. *Expenses for production of income*

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 69.

EXHIBIT J.

USC Title 26 Section 613.

§ 613. *Percentage depletion.*

(a) *General rule.*—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

(b) *Percentage depletion rates.*—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(1) 27½ percent—oil and gas wells.

(2) 23 percent—

(A) sulfur and uranium; and

(B) if from deposits in the United States—anorthosite (to the extent that alumina and aluminum compounds are extracted therefrom), asbestos, bauxite, beryl, celestite, chromite, corundum, fluorspar, graphite, ilmenite, kyanite, mica, olivine, quartz crystals (radio grade), rutile, block steatite talc, and zircon, and ores of the following metals: antimony, bismuth, cadmium, cobalt, columbium, lead, lithium, manganese, mercury, nickel, platinum and platinum group metals, tantalum, thorium, tin, titanium, tungsten, vanadium, and zinc.

(3) 15 percent—ball clay, bentonite, china clay, sagger clay, metal mines (if paragraph (2) (B) does not apply), rock asphalt, and vermiculite.

(4) 10 percent—asbestos (if paragraph (2) (B) does not apply), brucite, coal, lignite, perlite, sodium chloride, and wollastonite.

(5) 5 percent—

(A) brick and tile clay, gravel, mollusk shells (including clam shells and oyster shells), peat, pumice, sand, scoria, shale, and stone, except stone described in paragraph (6); and

(B) if from brine wells—bromine, calcium chloride, and magnesium chloride.

(6) 15 percent—all other minerals (including, but not limited to, aplite, barite, borax, calcium carbonates, refractory and fire clay, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2) (B) does not apply) bauxite, beryl, flake graphite, fluorspar, lepidolite, mica, spodumene, and talc, including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (8), the percentage shall be 5 percent for any such other mineral when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term "all other minerals" does not include—

(A) soil, sod, dirt, turf, water, or mosses; or

(B) minerals from sea water, the air, or similar inexhaustible sources.

(c) *Definition of gross income from property.*—For purposes of this section—

(1) *Gross income from the property.*—The term "gross income from the property" means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) *Mining.*—The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores.

EXHIBIT K.

USC Title 26 Sec. 7201

§ 7201. *Attempt to evade or defeat tax.*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851.

EXHIBIT L

USC Title 26 Section 7203

§ 7203. • *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1003

C. GEORGE SWALLOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Having been convicted after a jury trial in the United States District Court for the District of Colorado of wilful attempts to defeat and evade income taxes, petitioner was sentenced to concurrent prison terms of one year and one day. The court of appeals unanimously affirmed (307 F. 2d 81), and this Court denied certiorari (371 U.S. 950, rehearing denied, 372 U.S. 925). Petitioner now seeks review of the denial of a motion under 28 U.S.C. 2255 attacking that judgment.

Petitioner's motion alleged that the statutes under which he was convicted are unconstitutional and that his sentence is, therefore, void. The motion was denied by the district court, and the court of appeals affirmed on December 12, 1963. 325 F. 2d 97. The petition for a writ of certiorari was filed on April 14, 1964.

Petitioner makes four broad constitutional challenges: (1) that the income tax laws are too complex to be understood; (2) that the income tax laws are unjustly discriminatory; (3) that a portion of the federal revenue is impermissibly spent for foreign aid; (4) that the First Amendment is violated by provisions excluding from a minister's gross income the rental value of a home furnished to him and allowing deductions for contributions for religious purposes.

None of these contentions affects the validity of petitioner's conviction, even assuming *arguendo* that this action could be maintained following his release from custody. Petitioner did not contend at his trial that he was misled or confused by the alleged complexity of the tax laws, and the evidence supporting the judgment of conviction disclosed a simple scheme whereby a corporation controlled by petitioner was used to pay the personal expenses of petitioner and his wife. The alleged discriminatory features of the tax laws also do not bear upon petitioner's case; and

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[1] Although petitioner was serving his sentence at the time he filed the motion, he was released on June 28, 1963, which was more than five months before the date of the court of appeals' decision.

they are, in any event, reasonable tax classifications well within Congress' taxing power. *Brushaber* v. *Union Pac. R. Co.*, 240 U.S. 1, 24-26. Nor is petitioner in any position to challenge the purpose for which public funds have been spent merely because he has been convicted of income-tax evasion. His imprisonment is not attributable to Congress' appropriation of tax money for foreign aid, nor does he contend that his failure to pay taxes was prompted by his opposition to such expenditures. Hence, even if Congress' foreign-aid appropriations were constitutionally vulnerable—and they clearly are not—petitioner could not be said to have "sustain[ed] some direct injury as the result of" such appropriations. *Massachusetts* v. *Mellon*, 262 U.S. 447, 488. Finally, the validity under the First Amendment of the special treatment afforded certain taxpayers or certain kinds of expenses cannot be contested by a taxpayer such as petitioner who would not have the benefit of such treatment even if his contention were sustained. For if the assailed provisions were unconstitutional—which we do not concede—petitioner, whose conviction did not turn on the disallowance of any "non-religious" contributions or on the inclusion of any rental allowance as income on his return, would not be entitled to relief. Consequently, petitioner is not asserting "his own constitutional rights or immunities," *United States* v. *Raines*, 362 U.S. 17, 22; *McGowan* v. *Maryland*, 366 U.S. 420, 429, and his constitutional challenge must be dismissed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

MAY, 1964.

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